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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

BRIAN DOUGLAS BRADLEY,
Petitioner,

v.

UNIVERSITY OF TEXAS, M.D. ANDERSON CANCER CENTER, et al.,
Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

---

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether summary judgment is proper if the employee knew of the existence of the HIV positive health care worker, allowed the worker to remain on the job-site, performing the same duties for two years, but did not act until the health care worker, an AIDS activist, revealed to the Houston Chronicle newspaper his health status and the identity of his employer?

2. Whether the HIV positive status, for a health care worker, automatically represents an employee that is "otherwise disqualified" under the Rehabilitation Act or is the lower court required to individualize its findings to the individual and not the disease?

3. Whether, even if an employee is "otherwise disqualified", the employer has to take into consideration the employee's talents and skills in placement under the Act?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the Fifth Circuit are those listed in the caption as well as Georgia Thomas, M.D. and James Cox, M.D. (Appellees below and Respondents before this Court).

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 5

1. THIS CASE REPRESENTS AN IMPORTANT QUESTION OF LAW WITH RESPECT TO THE PROTECTIONS AFFORDED UNDER THE FIRST AMENDMENT, PARTICULARLY WHEN THE GOVERNMENTAL ENTITY KNEW OF THE CONDITION FOR TWO YEARS PRIOR, TO THE PUBLIC PRONOUNCEMENT ON PUBLIC POLICY CONSIDERATION AND THE EMPLOYEE'S HEALTH CONDITION.

2. THE COURT OF APPEALS' DECISION CONFLICTS WITH PRECEDENTS OF THIS COURT WITH RESPECT TO FIRST AMENDMENT PROTECTIONS SURROUNDING MATTERS OF PUBLIC CONCERN.

3. THE COURT OF APPEALS' AFFIRMANCE CONSTITUTES IPSO FACTO EXCLUSION OF HIV-POSITIVE HEALTH CARE WORKERS WHO MAY BE OTHERWISE QUALIFIED.

4. THE COURT OF APPEALS ERRED IN HOLDING THAT REASONABLE ACCOMMODATIONS UNDER THE REHABILITATION ACT DOES NOT REACH AN HIV-POSITIVE PERSON. THE DECISION INVITES SOCIETAL HYSTERIA INSTEAD OF SOUND HEALTH CARE POLICY.

CONCLUSION 12

Appendix A 1a

Initial Denial of Request for Summary Judgment; United States District Judge Kenneth Hoyt; denial January 8 and January 29, 1993

Appendix B 5a

Grant of Summary Judgment by Visiting Judge Milton Pollack dated February 9, 1993

Appendix C 9a

Opinion of the Fifth Circuit Court of Appeals rendered by per curiam opinion by Circuit Judges King, Higginbotham and Barksdale

TABLE OF AUTHORITIES

Cases **Page**

Bradley v. U. of Tex. M.D. Anderson Cancer Center, 3 Fed 3d 922 (1993) 1, 4, 5, 9

Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) 7

Doe v. District of Columbia, 796 F.Supp. 559 (D.D.C. 1992) 9, 10

Estate of Behringer v. Medical Center at Princeton, 249 N.J. Super. 597, 592 A.2d 1251 (N.J. Super. L. 1991) 10

Rankin v. McPherson, 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987) 4, 7

School Bd. of Nassau County v. Arline, 480 U.S. 273 (1987) 8, 9, 10

Constitutional Provisions, Statutes, Regulations, Guidelines and Rules

U. S. Const. amend. I 2, 5, 7

28 U.S.C. section 1254 (1) 2

29 U.S.C. section 794 2

42 U.S.C. section 1983 2

Other References

CDC, *Recommendations for Preventing Transmission of Human Immunodeficiency Virus and Hepatitis B Virus to Patients During Exposure-Prone Invasive Procedures* (1991) 11

Mary Ann Bobinski, *Risk and Rationality: The CDC and the Regulation of HIV-Infected Health Care Workers*, 36 St. Louis U. L. J. 213 (1992) 10

Sidney Watson, *Eliminating Fear Through Comparative Risk: Docs, AIDS and the Anti-Discrimination Ideal*, 40 Buffalo L. Rev. 739 (1992) 10

No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

BRIAN DOUGLAS BRADLEY,
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v.

UNIVERSITY OF TEXAS, M.D. ANDERSON CANCER CENTER, et al.,
Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner herein respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this action on October 7, 1993.

OPINIONS BELOW

The decision of the district court was not published. The decision of the court of appeals is reported at 3 F.3d 922 (5th Cir. 1993).

BASIS FOR JURISDICTION

The final judgment of the court of appeals was entered on October 7, 1993. This Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C. section 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I:

Congress shall make no law . . . prohibiting the free exercise thereof; or abridging the freedom of speech . . . .

42 U.S.C. section 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

29 U.S.C. section 794:

No otherwise qualified individual with a disability in the United States, as defined in section 706 (8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance under any program . . . .

STATEMENT OF THE CASE

On Saturday, July 20, 1991, the Houston Chronicle newspaper published an article quoting the Petitioner Brian Douglas Bradley. In the article, Petitioner was quoted as to his being HIV positive, that he was employed by the University of Texas M.D. Anderson Cancer Center as a surgical technician and that proposed legislation pending in Congress, known as the Helms bill, would cause nothing but hysteria in the health care field. Bradley's comments came at a time of public concern surrounding Kimberly Bergalis being infected with the HIV virus, proposed Centers for Disease Control guidelines and the uproar in the medical professions surrounding the intent of the Helms bill that sought to impose mandatory jail time or hefty fines on health-care workers infected with the AIDS virus who did not tell their patients about their illness.

The newspaper article ran on July 20, 1991. On July 22, 1991, Petitioner was administratively suspended, and on July 23, 1991, Petitioner was permanently removed from the position and placed in another position. Most interestingly, the Respondent admits that it knew about the Petitioner's health status, prior to the public pronouncement, for approximately two years but elected to retain the Petitioner in his same position, performing the same functions that he was undertaking prior to the Houston Chronicle news article.

The Petitioner filed suit in the United States District Court for the Southern District of Texas, Houston Division on January 22, 1992 asserting a violation of his First Amendment rights and his rights under the Rehabilitation Act of 1973 by virtue of his removal and placement in a position with "no patient contact". On January 8 and 11, 1993, United States District Judge Hoyt denied the Respondents' initial request for summary judgment (*See* at Appendix

A). On February 2, 1993, the case was transferred to a Judge Milton Pollack, a visiting judge. On February 2, 1993, an order was entered scheduling the matter for trial on February 15, 1993 before visiting Judge Pollack. On February 9, 1993, visiting Judge Pollack revisited the previously overruled summary judgment request and granted the motion to dismiss (*See* at Appendix B).

Petitioner filed his appeal with the Fifth Circuit Court of Appeals and on October 7, 1993 the panel, consisting of Circuit Judges King, Higginbotham and Barksdale, affirmed the district court's summary dismissal holding on the First Amendment (*See* at Appendix "C") issue "{t}o establish a prima facie case of retaliation for exercising free speech, a plaintiff must prove that his statements touch a matter of public concern, and that the speech was a motivating factor in the employer's adverse employment action. *Rankin v. McPherson*, 483 U.S. 378, 385-86, 107 S.Ct. 2891, 2897, 97 L.Ed.2d 315 (1987). If an employee would have reached the same decision without regard to the constitutionally protected incident, then the incident was not a motivating factor in defendant's decision. *Mt. Healthy City School Dist. Board of Educ. v. Doyle*, 429 U.S. 274, 285-87, 97 S.Ct. 568, 575-76, 50 L.Ed.2d 471 (1977)." The panel does not mention and does not concern itself with the employer having known of the condition for two years and the employee having performed his job functions as a health care worker during the two-year period prior to his "bold" pronouncement to the media, and to public in particular, as related to his status and the effect of the Helms' legislation.

The panel also ruled that the Petitioner was not "otherwise qualified" to perform his essential functions of his job, even though he had performed the functions for the two years prior to his public pronouncement with the employer's knowledge and consent. The panel does not concern itself

with medical probability, but rules that the nature of the risk associated with the disease, while not large, required the removal of the Plaintiff from his job position. *Bradley*, *id.* at 924. The panel accepted the district court's logic in granting summary judgment and ruled that reasonable accommodation as to the Petitioner did not mean consideration of Petitioner's skills but simply placement anywhere the employer desired.

REASONS FOR GRANTING THE WRIT

I & II. THIS CASE REPRESENTS AN IMPORTANT QUESTION OF LAW WITH RESPECT TO THE PROTECTIONS AFFORDED UNDER THE FIRST AMENDMENT PARTICULARLY WHEN THE GOVERNMENTAL ENTITY KNEW OF THE CONDITION TWO YEARS PRIOR TO THE PUBLIC PRONOUNCEMENT ON THE PUBLIC POLICY CONSIDERATION AND THE EMPLOYEE'S HEALTH CONDITION.

This case presents important issues as related to AIDS policies in this country and how discussion of the public policy issues concerning HIV positive health care workers, the passage of laws criminalizing silence and public hysteria related both to the First Amendment and the Rehabilitation Act of 1973. This case presents a factual circumstance wherein Petitioner was requested to comment on proposed legislature then pending in Congress. The legislature was sponsored by Senator Jesse Helms. Petitioner had previously spoken out on AIDS policies in this country and had expressed his opinions in local, regional or national media outlets. The publication of his name, his seropositive status

and his employer was the first time that those issues would be published for the public's consumption.

Petitioner was removed from his position upon the publication of the information in the newspaper - this reality was so even though the employer admits that it knew of this information some two years prior to the publication of the information (admitted by supervision, to-wit: Falkenhagen (deposition testimony at 16, lines 16-25; 17, lines 1-25; 18, lines 21-25; 19, lines 18-22; also at Vol. 2 at 620-642); also admitted by Dr. Georgia Thomas and Joyce Alt, the head of the nursing division (deposition of Alt at Vol. 2 at 596-617; at 14, lines 9-25)).

The decision to remove Bradley was clearly because of his outspokenness surrounding an issue of public concern. The internal memorandum of the Respondent Thomas dated July 22, 1991, exemplifies the same: "When I arrived at the office this AM, Kathy Falkenhagen, RN, head nurse in OR, called to inform me about a 7/20 newspaper article in the Houston Chronicle, where Brian identified himself as an HIV-infected "scrub nurse" at MDACC, and told the Chronicle writer that he thought that MDACC would fire him if the Helms legislation was enacted. Kathy described Brian as an AIDS activist who travels all over the country to speak and demonstrate about AIDS. His scrub tech duties consist of: 1. threading needles; 2. passing instruments; 3. retracting; 4. constantly in the operative field, but less often with hands directly in the wounds. Kathy said he does not suture, although some techs do. In general, *he performs a lower order of tasks at MDACC, where there are lots of surgeons to assist, than he would in a smaller hospital* (emphasis added), where techs frequently perform almost as first surgical assistants. In an emergency, he might be called on to retract intestines with a lap pad, and certainly has the potential to be close enough, or in the body cavity, to bleed

into it if he were lacerated accidentally . . . I discussed issue in general terms with Carmen Stallings, J.D., Risk Manager, today. We both agree the decision about whether to require job reassignment to non-invasive procedure work revolves around the (medicolegal one) of whether the institution wants a zero risk (thus job reassignment) or very low risk (which would allow Brian to remain performing his current job duties)."

The above memorandum would be issued after the public pronouncement. The information in the newspaper was not new to the employer and the question of zero risk versus very low risk had never become an issue the two years prior. Bradley related, in his affidavit seeking to defeat summary judgment, that he was told by Thomas that if "he had not talked to the Houston Chronicle then nothing would have happened to you" (Affidavit of Bradley at Vol. 2 at 588, 589).

The court of appeals attempts to fashion its findings consistent with this Court's decision in *Rankin v. McPherson*, *supra*, but crafts an opinion that says that the Petitioner would have been removed because of his HIV-positive status, but does not mention and ignores that the information in the article was known by the Respondent and its agents. The essence of the court of appeals decision is to divest HIV-positive persons, or persons who may fall under the Rehabilitation Act of 1973, of their First Amendment protection.

The court of appeals' decision ignores this Court's decision in *Connick v. Myers*, 461 U.S. 138, 147, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), wherein this Court provided "{i}t has consistently been stated that an employee's speech is to be viewed to determine whether it was a matter of public concern and that the same is to be determined by the content, form, and context of a given statement, as revealed

by the whole record." The court of appeals' decision creates a dangerous policy with respect to governmental employees speaking out on issues of public concern and pretextual reasons then being created to move, terminate, or silence the employee for exercising his or her First Amendment privileges.

III & IV: UNDER THE COURT OF APPEALS' DECISION HIV-POSITIVE HEALTH CARE WORKERS ARE SUBJECTED BOTH TO AUTOMATIC REMOVAL FROM THEIR POSITION WITHOUT ANY REQUIRED INDIVIDUALIZATION OR REASONABLE ACCOMMODATIONS.

If the decision of the court of appeals is allowed to stand, then no employee who poses a risk to others in the work force will be granted the full hearing that Congress intended when it specifically amended the Rehabilitation Act to protect persons with contagious diseases from unwarranted discrimination (29 U.S.C. section 706 (1988)). It should be worth noting that the district court did not follow the four-part test set out in *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 288-93 (1989). The court of appeals affirmed the grant of summary judgment and accepted the district court's acceptance of the zero risk policy taken by the Respondents. It is the Petitioner's position that this Court should grant certiorari to determine whether HIV-positive persons in the health care filed, ipso facto, are excluded from participating in their chosen profession, thus carving out an exception to *Arline*. It is the Petitioner's position that the zero risk policy violates federal law which requires a significant risk before permitting discrimination. There is a dispute in the record as to whether Bradley's job responsibilities actually involved "exposure-prone" as opposed to

"invasive" procedures. Compare Tr. at Vol. 2 at 438 (description of Bradley's job task with assessment of "very low risk") and Tr. at Vol. 2 at 476-477 (confusion about what Bradley's job actually entailed) with Tr. at Vol. 2 at 461 (suggestion that some aspects of Bradley's employment might involve exposure-prone procedures). The Centers for Disease Control guidelines recommend no extraordinary restrictions on the practice of HIV-infected health care workers who perform invasive procedures, as opposed to more serious "exposure-prone" procedures.

As related to the memorandum of Georgia Thomas, mentioned earlier, Dr. Thomas admits that Bradley did not perform certain risky procedures that others did because of the large size of the facility and the availability of staff to aid. *Arline* surely means more than the suspension of Petitioner within a few hours of the Respondents learning of his newspaper interview and his permanent removal from the operating room the next day (Tr. at Vol. 2 at 452). The Respondents also admit that they failed to take steps to identify and transfer any other HIV-infected health care workers, Tr. at Vol. 2 at 472; a bizarre stance given the allegedly indisputable risk posed by infected workers. More importantly, the notion that summary dismissal is proper on the First Amendment claim, with prior knowledge, strains credulity and ignores the pretextual nature of the discriminatory conduct in violation of the Act.

And ironically, the court of appeals admits "{t}his risk while present, is not large", *Bradley*, at 924, but uses the HIV-positive status to not only remove the Petitioner from his position but also uses his status to fail to reasonably accommodate the Petitioner (*see* contrary decisions *Doe v. District of Columbia*, 796 F.Supp. 559, 568-569 (D.D.C. 1992) ("extremely remote" risk of HIV transmission during performance of firefighter and emergency medical function

insufficient to meet "direct threat" requirement); Sidney Watson, *Eliminating Fear Through Comparative Risk: Docs, AIDS and the Anti-Discrimination Ideal*, 40 Buffalo L. Rev. 739, 786 (1992); and Mary Ann Bobinski, *Risk and Rationality: The Centers for Disease Control and the Regulation of HIV-Infected Health Care Workers*, 36 St. Louis U. L. J. 213, 267 (1992)).

The court of appeals also cites two decisions to support its ipso facto decision with respect to HIV-positive health care workers. The first of the decisions cited to support its position is *Estate of Behringer v. Medical Center at Princeton*, 249 N.J. Super. 597, 592 A.2d 1251 (N.J. Super. L. 1991). The *Behringer* case did not arise under the Rehabilitation Act of 1973. In *Behringer*, the court's opinion focused on the ability of a hospital to require an HIV-infected surgeon to notify his patients of his HIV-infection before performing surgery. *Id.* at 592 A.2d at 1283. The *Behringer* court clearly erred when it weighed the patient's fear of HIV transmission into its calculus of the significance of the risk imposed by the infected surgeon. *Compare*, *School Board of Nassau County v. Arline*, *supra* (this Court's decision does not indicate that students' fears of exposure to TB can be weighed into risk calculus); *see also*, Bobinski, *Risk and Rationality*, *supra* at 266 n. 207.

Finally, the *Doe v. Washington University case* cited by the court of appeals involves the termination of a dental student from his educational program (*see* at 780 F.Supp. 628 (E.D. Mo. 1991)). In *Doe*, the district court did not apply the "significant risk" standard required in the case at bar. The *Doe* court applied a special standard because of the academic context of the decision, *id.* at 631, and upheld the student's termination because it was not "arbitrary and irrational." *Id.* at 634. Based upon the ipso facto logic of "you are HIV-positive", the court of appeals' decision allows

for the ignoring of the Petitioner's affidavit in opposition of summary judgment. The affidavit provided . . . "Dr. Thomas {in our meeting} related that 'if I had not talked to the Houston Chronicle then nothing would have happened to you'. I reported back the next day and was told that I would never be able to work in the operating room again. I was never asked about my job or given any input as to how my HIV positive status would play a role in my job, placement, etc. When I placed with Leslie Silkwood, Director of Human Resources, I was informed of the jobs that the institution had decided on. I had no input in any restructuring of my job, the placing of myself in any job consistent with Texas law or CDC guidelines as to dealing with patient care. All such jobs offered related to matters not to my training or background. The jobs presented entailed 1) a telephone purchasing agent; 2) a job consisting of unloading sterile supplies off the receiving dock at the hospital (referred to this job as sterile technician job); 3) purchasing assistance job (received requisitions from various place(s) in hospital and placed order(s) for hospital) (accepted this job); 4) a runner position (clerk). I requested from Kathy Falkenhagen, Director of Operating room, whether I could be placed as an orderly in the operating room which entails a job with no invasive patient contact. The orderly position entails "putting the patient in a wheel chair and rolling the patient down the hall, obtaining supplies, restocking, mopping floor(s), lifting, etc." I was informed by Kathy Falkenhagen, as to my request for an orderly position, that "she was instructed that I was to be removed from the operating room(s), period." Ms. Falkenhagen also related that this understanding was related by Dr. Cox and that I was not to work in the operating room under any capacity and that I must seek a job somewhere else in the institution. This information was re[layed] that even if a job as an orderly

came open in the operating room, I would not be allowed to be placed in that position (Affidavit of Bradley at Vol. 2, at 588, 589).

CONCLUSION

In light of the importance of the court of appeals' decision as it affects health care workers and health care policy, it is prayed that this Court grant the writ of certiorari. In addition, with respect to the decision to act adversely against the Petitioner for his public pronouncement, the court of appeals' decision should be reversed and this issue remanded to the district court for trial.

Respectfully submitted,

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ATTORNEY FOR PETITIONER
BRIAN DOUGLAS BRADLEY

JANUARY 5, 1994

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BRIAN DOUGLAS BRADLEY,
Plaintiff,

VS.

CIVIL ACTION NO.
H-92-189

THE UNIVERSITY OF TEXAS
M.D. ANDERSON CANCER
CENTER, ET AL.,
Defendants.

ORDERS

Pending before the Court are motions filed by both, the plaintiff and the defendants. The Court will rule on the motions as follows:

The defendants' motion for leave to file an amended motion for partial dismissal of the plaintiff's amended complaints is GRANTED. Having granted the motion, the Court is of the opinion that the motion should be denied, in substantial measure.

The defendant reads *Crane v. The State of Texas*, 759 F.2d 412 (1985), incorrectly. It is the Court's opinion that the defendant institution is not the state of Texas, but merely an arm of the state. The Eleventh Amendment does not apply to independent political entities. *Hall v. Medical*

College of Ohio, 742 F.2d 299 (6th Cir. 1984); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984). Therefore, the Eleventh Amendment relief sought by the defendants is DENIED.

It is undisputed that the actions taken by the officials were taken pursuant to policy. Therefore, no individual liability may be asserted against the individual defendants.

It is ORDERED that all claims against the individual defendants are DISMISSED as barred based on qualified immumity. The claims against the individuals in their official capacities shall remain.

The plaintiff's motion for leave to supplement/amend his complaint is GRANTED. The Court is of the opinion that no new cause of action is asserted requiring any delay or the need for additional discovery.

The defendant's motion to compel answers to interrogatories and request for production is GRANTED. The plaintiff is ORDERED to comply within 10 days of this ORDER. The lateness in the defendants' requests in this motion filed shall not be cause for delay in the trial of this case.

It is so ORDERED.

Signed this 8th day of January, 1993.

/s/
KENNETH M. HOYT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BRIAN DOUGLAS BRADLEY,

Plaintiff,

VS. CIVIL ACTION NO. H-92-189

THE UNIVERSITY OF
TEXAS M. D. ANDERSON
CANCER CENTER, ET AL.,

Defendants.

ORDERS

Pending before the Court are the defendants' amended motion to dismiss the plaintiff's second amended complaint (instrument #38) and the defendants' motion to dismiss.

In the defendants' motion for reconsideration they do not argue that the Court lacks jurisdiction, or that some form of relief cannot be granted pursuant to 42 U.S.C. Section 1983. On the contrary, they agree. They merely argue that some of the relief requested cannot be granted. This argument is a no issue argument and simply seeks to interrupt a speedy trial on the issues. Whether the Court may enter a judgment of any sort against the defendants is a

question of law that may be decided before, during, or after a trial on the facts. The fact that a judgment may be entered leaves this Court the discretion to proceed as it is proceeding.

Each of the defendants' motions is DENIED.
It is so ORDERED.
Signed this 29th day of January, 1993.

_____/s/_____
KENNETH M. HOYT
UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
Houston Division

BRIAN DOUGLAS BRADLEY,
Plaintiff

vs.

CIVIL ACTION NO.
H-92-189

THE UNIVERSITY OF TEXAS M.D.
ANDERSON CANCER CENTER,
GEORGIA THOMAS, M.D., in her
Individual and Official Capacity,
and JAMES COX, M.D., in his
Individual and Official Capacity,
Defendants

ORDER AND JUDGMENT

The plaintiff has alleged that his removal from his position as a surgical technologist was in violation of his First Amendment privileges, actionable through 42 U.S.C. Section 1983, and the Rehabilitation Act of 1973, as amended 29 U.S.C. Section 794.

On February 19, 1992 defendants filed their Motion for Partial Dismissal of both claims and Judge Kenneth Hoyt dismissed plaintiff's 42 U.S.C. Section 1983 cause of action against defendant MDA with prejudice on March 23, 1992, leaving outstanding the Rehabilitation Act claim still subject

to the FRCP Rule 56 motion. On July 1, 1992, plaintiff filed his so-called First Amended Complaint adding Dr. Georgia Thomas and Dr. James Cox as individual defendants and asserted also that those individuals and M.D. Anderson acted under color of law in a manner that violated his free speech, due process and equal rights under sections of the Texas Constitution.

(Subsequently on January 8, 1993, Judge Hoyt ordered that the claims against the individual defendants were dismissed based on qualified immunity, leaving outstanding the claims against them in their official capacities).

On October 30, 1992 defendants readdressed the plaintiff's claim under the Rehabilitation Act of 1973 as amended in 29 U.S.C. Section 794. On November 20, 1992 an order was made and entered granting defendants' motion for *leave to file* an Amended Motion by Defendants for Partial Dismissal of Plaintiff's First Amended Complaint, First Amended Original Answer and Defendants' Amended Motion for Summary Judgment and authorizing the Clerk to accept the same for filing. The Amended Motion so allowed was filed accordingly and has remained outstanding until this date.

The October 30, 1992 motion of defendants addressed the Rehabilitation Act claim as to all defendants and the First Amendment claim as to the two individual defendants in their official capacities. Those claims are still open under the October 30, 1992 Motion for Summary Judgment.

On or about January 3, 1993 plaintiff sought leave to assert herein causes of action under the Americans with Disabilities Act (42 U.S.C. Section 101) and the Texas Health & Safety Code Ann. Section 85.201 et seq. That motion was granted on January 11, 1993.

Thereupon, on January 21, 1993 defendants moved to dismiss the Plaintiff's Second Amended Complaint. Defendants contended that a valid cause of action could not be stated by plaintiff under the Americans with Disabilities Act, since the Act did not become effective towards defendants until July 26, 1992, or one year after the alleged ADA violation events pled by plaintiff. Defendants pointed out moreover that plaintiff was not discharged, he was merely transferred to another position and has suffered no loss in salary or benefits; that plaintiff is litigating the original transfer, which occurred in July, 1991 and cannot, therefore, viably argue that defendants' failure to reinstate him in his original position somehow renders his initial alleged violation a continuing one.

On February 1, 1993 Judge Hoyt ruled that the motion to dismiss the ADA claim was meritorious and ORDERED that plaintiff's claim against defendant MDA based on alleged violations of the Americans with Disabilities Act (42 U.S.C. Section 101) be DISMISSED with prejudice for the reasons set forth in the defendants' motion.

The outstanding claims herein also include a claim added by plaintiff to his pleading under a Texas statutory course of action, a state-created claim which is pendent to the federal claim asserted.

The Court has reviewed the outstanding federal claim under the Rehabilitation Act and the First Amendment and for the reasons shown by defendants in their motion papers hereby grants the dismissal thereof with prejudice sought by defendants as insufficient in law under its amended motion for summary judgment thereon.

Accordingly the pendent Texas law claim is also dismissed, but without prejudice, since there is no federal

claim to which it is pendent.

The foregoing disposes of all remaining claims herein accordingly.

SO ORDERED February 9, 1993.

/s/
MILTON POLLACK
Senior United States Judge

APPENDIX C

Brian Douglas BRADLEY,
Plaintiff-Appellant,

v.

UNIVERSITY OF TEXAS M.D.
ANDERSON CANCER
CENTER,

Georgia Thomas, M.D., in her Individual
and Official Capacity, and James Cox,
M.D., in his Individual and Official Capacity,
Defendants-Appellees.

No. 93-2227
Summary Calendar

United States Court of Appeals
Fifth Circuit

October 7, 1993

Surgical technician who was infected with Human Immunodeficiency Virus (HIV) brought action against hospital and supervisors claiming that his reassignment as procurement assistant in purchasing department violated Rehabilitation Act and constituted retaliation in violation of First Amendment for speaking to newspaper. The United States District Court for the Southern District of Texas, Milton Pollack, Senior District Judge, sitting by designation, entered summary judgment for hospital and supervisors, and appeal was taken. The Court of Appeals held that: (1)

technician was not "otherwise qualified" to continue in his employment within meaning of Act, and (2) technician's speech was not motivating factor in hospital's decision.

Anthony P. Griffin, Galveston, TX, for plaintiff-appellant.

Ann F. MacMurray, Asst., Dan Morales, Atty. Gen., Austin, TX, for defendants-appellees.

Appeal from the United States District Court for the Southern District of Texas.

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:

In a July 20, 1991 *Houston Chronicle* article Brian Bradley revealed that he was HIV-positive and that he worked for the University of Texas M.D. Anderson Cancer Center as a surgical assistant. Soon thereafter the hospital reassigned him as a procurement assistant in the purchasing department. He then sued the hospital and two supervisors claiming that his reassignment violated section 504 of the Rehabilitation Act of 1973, 29 U.S.C. section 794, and constituted retaliation in violation of the First Amendment for speaking to the *Chronicle*. The district court granted summary judgment on those claims and dismissed Bradley's pendent state law claims. We affirm.

We address the Rehabilitation Act claim first. Bradley has the burden of establishing a prima facie case. One element of that case is showing that he is "otherwise qualified" to participate in the activity at issue. *Brennan v. Stewart*, 834 F.2d 1248, 1260 (5th Cir. 1988). Assuming

without deciding the seropositivity to HIV antibodies is an impairment within the meaning of the Act, the issue in this case is whether Bradley is otherwise qualified to continue in his employment as a surgical technician.

An "otherwise qualified" person can perform the essential functions of the job in question. *School Board of Nassau County v. Arline,* 480 U.S. 273, 288-89 & nn. 16-19, 94 L.Ed.2d 307, 107 S.Ct. 1123, 1131 & nn. 16-19 (1987). In the context of the employment of a person handicapped with a contagious disease the inquiry should include:

> [findings of] facts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties), and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.

Id. 480 U.S. at 288, 107 S.Ct. at 1131. The court should give deference to the reasonable medical judgments of public health officers. If an employee cannot perform the essential functions of the job the court should consider whether any "reasonable accommodation" by the employer would let the handicapped person perform those functions. *Id.*

The parties do not dispute the first three factors. The nature of the risk is not at issue, as all parties recognize that blood entering a patient's body can transmit HIV. The duration of the infection is perpetual, and the virus inevitably leads to the fatal disease AIDS.

The disputed issue is the probability of transmitting the virus. The nature of Bradley's work as a surgical technologist creates some risk. He works in the sterile field within which surgery is performed, often coming within inches of open wounds and placing his hand in the body cavity roughly once a day. His duties include handing the handles of instruments to surgeons while he holds the sharp end, and he admits that accidents occur despite care. Bradley reports suffering five needle puncture wounds while on the job.

This risk, while present, is not large. The Centers for Disease Control (CDC) state that "the risk of transmitting HBV [Hepatitis B Virus] from an infected HCW [Health Care Worker] to a patient is small, and the risk of transmitting HIV is likely to be even smaller." CDC also notes that the risk of exposure "is greater for certain procedures designated as exposure-prone" such as "the simultaneous presence of the HCW's fingers and a needle or other sharp instrument or object in a . . . highly confined anatomic site." Centers for Disease Control, *Recommendations for Preventing Transmission of Human Immunodeficiency Virus and Hepatitis B Virus to Patients During Exposure-Prone Invasive Procedures, in* Morbidity and Mortality Weekly Report, July 17, 1991.

While the risk is small, it is not so low as to nullify the catastrophic consequences of an accident. A cognizable risk of permanent duration with lethal consequences suffices to make a surgical technician with Bradley's responsibilities not "otherwise qualified." *See Doe v. Washington Univ.*, 780 F.Supp. 628, 632-34 (E.D. Mo. 1991) (HIV-positive dental student not otherwise qualified to perform invasive procedures because the risks defy the axiom to at least do no harm). *See also Estate of William Behringer v. Medical Center,* 249 N.J. Super. 597, 592 A.2d 1251, 1276-77 (Law

Div. 1991) (no violation of state statute proscribing discrimination against the handicapped because HIV-positive surgeon posed a
"reasonable probability of substantial harm" to others).

The Eleventh Circuit's opinion in *Harris v. Thigpen*, 941 F.2d 1495 (1991) does not control here. In *Harris* the trial judge found that HIV-infected prisoners were not "otherwise qualified" to engage in a wide range of prison activities. The Eleventh Circuit remanded for program-by-program findings of fact. In this case we know the specific duties of the job involved.

The hospital cannot make "reasonable accommodation" to eliminate the risks connected with the "essential functions" of this job. *See Arline*, 480 U.S. at 288 n. 16, 107 S.Ct. at 1131 n. 16. For the hospital to have accommodated Bradley, it would have had to eliminate the essential function of being in the operative field. The CDC's conclusions about the risks assume that doctors and technicians exercise care during surgery but inevitably experience accidents. Moving Bradley away from the operation would require using another assistant to substitute in for the functions Bradley could not perform, requiring even more redefinition of essential roles. Such redefinition exceeds reasonable accommodation. *See Southeastern Community College v. Davis*, 442 U.S. 397, 407-08, 99 S.Ct. 2361, 2367-68, 60 L.Ed.2d 980 (1979).

Bradley contends that he should have been reassigned to a job involving patient contact. This contention fails. As reasonable accommodation cannot be made for the job he had, his employer has no duty to reassign Bradley to any particular job, although it could not deny him alternative employment opportunities reasonably available under the employer's existing policies. *Arline*, 480 U.S. at 289, 107

S.Ct. at 1131 n. 19, *Carter v. Tisch,* 822 F.2d 465, 467 (4th Cir. 1987). Bradley does not allege that he sought any other specific position in the hospital after his reassignment and does not demonstrate the availability of other positions.

With this analysis as background, we turn to the First Amendment claim. To establish a prima facie case of retaliation for exercising free speech, a plaintiff employee must prove that his statements touch a matter of public concern, and that the speech was a motivating factor in the employer's adverse employment action. *Rankin v. McPherson,* 483 U.S. 378, 385-86, 107 S.Ct. 2891, 2897, 97 L.Ed.2d 315 (1987). If an employer would have reached the same decisions without regard to the constitutionally protected incident, then the incident was not a motivating factor in defendant's decision. *Mt. Healthy City School Dist. Board of Educ. v. Doyle,* 429 U.S. 274, 285-87, 97 S.Ct. 568, 575-76, 50 L.Ed.2d 471 (1977). An employee should not be placed in a better position as a result of exercising constitutionally protected speech. *Id.* at 287, 97 S.Ct. at 576.

We find that Bradley has not shown that his speech was a motivating factor. His HIV-positive status gave the hospital grounds to reassign him. The fact that he informed the hospital of his status in a newspaper article does not change the hospital's rights in this situation. *See id.* We find no merit in Bradley's claim that he was singled out because the hospital had an inadequate detection system.

AFFIRMED.